Supreme Court, U.S.
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No. 06-618

In the Supreme Court of the United States

OFFICE OF SENATOR MARK DAYTON,

Appellant,

v.

BRAD HANSON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUGGESTION OF MOOTNESS

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QUESTION PRESENTED

Does the fact that the Office of Senator Mark Dayton, the defendant in the action below, ceased to exist on January 3, 2007, require that the lower courts' decisions be vacated and the case be remanded with directions to dismiss as moot, where, in providing a limited waiver of sovereign immunity for suits, such as this one, brought under the Congressional Accountability Act of 1995, 2 U.S.C. §§ 1301-1438 (2000) ("CAA"), Congress specified the defendant and did not provide for substitution for a defunct defendant?

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This action abated and became moot on January 3, 2007, when the Dayton Office ceased to exist; accordingly, the Court should vacate the circuit court's decision and should remand with directions to vacate the district court's decision and to dismiss the action 2

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STATEMENT

Procedural Background

Brad Hanson ("Hanson") is a former employee of the Office of Senator Mark Dayton ("the Dayton Office"). On May 29, 2003, Hanson filed suit in the United States District Court for the District of Columbia alleging that the Dayton Office had violated the CAA by discriminatorily terminating his employment and failing to pay him overtime pay.

On September 12, 2003, the Dayton Office moved the district court to dismiss the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the ground that the Speech or Debate Clause of the United States Constitution provides the Dayton Office with absolute immunity from the action ("the Motion to Dismiss"). The district court issued a minute order on September 7, 2004, denying the Motion to Dismiss. J.S. App. 59a.[1]

On September 21, 2004, the Dayton Office appealed from the district court's denial of the Motion to Dismiss. The United States Court of Appeals for the District of Columbia Circuit, sitting en banc, heard the case on November 30, 2005. In a fragmented decision issued on August 18, 2006, the D.C. Circuit affirmed the district court's order denying the Motion to Dismiss. J.S. App. 27a, 28a, 57a, 60a-61a.

The Dayton Office filed its notice of appeal from the D.C. Circuit's order on October 31, 2006, and filed its Jurisdictional Statement with this Court on November 3, 2006.

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[1] "J.S. App. __" refers to the pages of the appendices to the Jurisdictional Statement the Dayton Office filed on November 3, 2006.

Relevant Facts

By constitutional mandate, Senator Dayton's term of office as a United States Senator ended at noon on January 3, 2007. See U.S. CONST. amend. XX, § 1. Upon the expiration of Senator Dayton's term of office, the Dayton Office ceased to exist.

ARGUMENT

THIS ACTION ABATED AND BECAME MOOT ON JANUARY 3, 2007, WHEN THE DAYTON OFFICE CEASED TO EXIST; ACCORDINGLY, THE COURT SHOULD VACATE THE CIRCUIT COURT'S DECISION AND SHOULD REMAND WITH DIRECTIONS TO VACATE THE DISTRICT COURT'S DECISION AND TO DISMISS THE ACTION

This case abated and is moot because a necessary party, the Dayton Office, ceased to exist and Congress has not authorized the substitution of another defendant in place of the Dayton Office.

"The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (citations omitted). Waivers of sovereign immunity "cannot be implied," *United States v. King*, 395 U.S. 1, 4 (1969); rather, a "waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text," *Lane v. Pena*, 518 U.S. 187, 192 (1996). Any "'limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.'"

Lehman v. Nakshian, 453 U.S. 156, 161 (1981) (quoting *Soriano v. United States*, 352 U.S. 270, 276 (1957)).

Only Congress is empowered to enact statutes that subject congressional defendants to federal court litigation. See U.S. CONST. art. I, § 1; see also *Nw. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 95 (1981) ("federal lawmaking power is vested in the legislative, not the judicial, branch of government"); *United States v. N.Y. Rayon Imp. Co.*, 329 U.S. 654, 660 (1947) (holding that the Court of Claims "lack[ed] any power" to waive sovereign immunity because only Congress could provide the required statutory waiver of sovereign immunity).

Furthermore, only Congress is empowered to provide for a successor to a defunct government-entity defendant. See *Asociacion de Empleados del Area Canalera (ASEDAC) v. Panama Canal Comm'n*, 453 F.3d 1309, 1316 (11th Cir. 2006) (holding that a federal court cannot substitute an executive branch agency to defend a suit in place of a terminated government entity "[a]bsent an unequivocal statutory expression of Congress's intent to waive [that executive branch agency's] sovereign immunity"). When a defendant ceases to exist without a successor, the case cannot continue and litigation against the defendant abates. See *Def. Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 634 (1949) (stating that unless statutory language provides otherwise, when a corporation dissolves, pending litigation abates because of the "'impossibility' of proceeding 'without a defendant'"); *ASEDAC*, 453 F.3d at 1314-16 (affirming government corporations' motion to dismiss when plain meaning of statute terminated the corporations and Congress did not provide for non-abatement of litigation and substitution); *Skolnick v. Parsons*, 397 F.2d 523, 525 (7th Cir. 1968) (holding that action

against federal commission abated when commission terminated without a successor).

The CAA, the statute on which Hanson's claims are based, specifies that the defendant in a CAA action "shall be the employing office alleged to have committed the violation, or in which the violation is alleged to have occurred." 2 U.S.C. § 1408(b). As relevant to this case, the CAA defines the term "employing office" as "the personal office . . . of a Senator." 2 U.S.C. § 1301(9)(A). When construing this definition, the Court "should prefer the plain meaning [of the statute's terms] since that approach respects the words of Congress." *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004). As relevant to this action, the plain meaning of the phrase "personal office . . . of a Senator" is the Dayton Office. According to Hanson's Complaint, the alleged violations of the CAA were committed by and in the Dayton Office – the personal office of Senator Dayton when he served in the United States Senate. C.A. App. A3, A5-A6, ¶¶ 4, 17, 19, 21.[2]

By constitutional mandate, Senator Dayton's term of office as a United States Senator ended at noon on January 3, 2007. See U.S. CONST. amend. XX, § 1 ("[T]he terms of Senators and Representatives [shall end] at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified."). Upon the expiration of Senator Dayton's term of office, the Dayton Office ceased to exist.

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[2] "C.A. App __" refers to the pages of the parties' Joint Appendix filed in the Court of Appeals for the District of Columbia Circuit on July 11, 2005, in Case No. 04-5335.

The CAA does not contain any provision for naming a successor to a defendant employing office when that employing office ceases to exist.[3] Moreover, the CAA unequivocally prohibits reference to outside statutory authority to enlarge the CAA's jurisdictional grant. See 2 U.S.C. § 1410 ("Except as expressly authorized by sections 1407, 1408, and 1409 of this title, the compliance or noncompliance with the provisions of this [Act] . . . shall not be subject to judicial review."); see also 2 U.S.C. § 1413 ("The authorization to bring judicial proceedings under sections 1405(f)(3), 1407, and 1408 of this title shall not constitute a waiver of sovereign immunity for any other purpose . . . ."). Accordingly, this action against the Dayton Office has abated.

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[3] In contrast to the CAA, numerous other federal statutes explicitly provide for the avoidance of abatement and the substitution of parties in litigation involving government offices and entities that cease to exist. See, *e.g.*, 5 U.S.C. § 907(c) (2000) (providing that actions by or against the head of an executive branch agency do not abate by reason of an agency reorganization plan and that "within twelve months after the reorganization plan takes effect," a party may move for substitution of "the successor of the head . . . under the reorganization effected by the plan or, if there is no successor, against such agency or officer as the President designates"); 15 U.S.C. § 767(d) (2000) (providing that "[n]o cause of action by or against any department or agency, functions of which are transferred by [reorganization of executive branch functions and agencies to create the Federal Energy Commission] . . . shall abate by reason of the [reorganization]" and permitting substitution of the United States in such proceedings); 20 U.S.C. § 3505(d), (e) (2000) (providing that "[n]o cause of action by or against any department or agency, functions of which are transferred by [reorganization of the Department of Education] . . . shall abate by reason of the [reorganization]" and permitting substitution of the Secretary of Education in such proceedings); 22 U.S.C. § 6615(d), (e) (2000) (providing for "[n]onabatement of proceedings" and "[c]ontinuation of proceedings with substitution of parties" in connection with the reorganization and consolidation of the Foreign Affairs agencies); 22 U.S.C. § 6543(c), (d) (2000) (same); 42 U.S.C. § 7295(d), (e) (2000) (similar - Department of Energy).

When there are no longer adverse parties with sufficient legal interests to maintain litigation, the case is mooted. *Goldin v. Bartholow*, 166 F.3d 710, 717 (5th Cir. 1999). "A moot case presents no Article III case or controversy, and a court has no constitutional jurisdiction to resolve the issues it presents." *Id.*; see also *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) ("To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." (internal citations and quotation marks omitted)). Further, when a case becomes moot through happenstance "while on its way" to this Court or "pending [this Court's] decision on the merits," this Court's practice is to vacate the lower court's judgment in the case and to order dismissal. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); see also *Anderson v. Green*, 513 U.S. 557, 560 (1995) (holding that when case on review is rendered nonjusticiable, vacatur of both the appellate and district courts' judgments and dismissal of the case are appropriate). Vacatur is based on the equitable consideration that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). An action becomes moot through "happenstance" when the controversy presented for review has "become moot due to circumstances unattributable to any of the parties." *Karcher v. Ma* , 484 U.S. 72, 82 (1987); cf. *id.* at 83 ("[T]his controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party—the [State] Legislature—declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case."); *U.S. Bancorp Mortgage Co.*, 513 U.S. at 25 (holding vacatur does not apply where mootness results from settlement because "the losing party has

voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari").

This action is moot because, as explained above, two adverse parties to this litigation no longer exist. Therefore, the "case or controversy" requirement for this Court's jurisdiction is lacking. Further, this action became moot through happenstance because the Dayton Office's cessation was an unavoidable consequence of the expiration of Senator Dayton's term of office. The Constitution mandates the expiration date of a Senator's term of office. Accordingly, that the Dayton Office ceased to exist during the pendency of this lawsuit is a circumstance unattributable to the Dayton Office. Cf. *Doe v. Madison School Dist. No. 321*, 177 F.3d 789, 799 (9th Cir. 1999) (because case was mooted due to plaintiff's graduation from high school, case was mooted due to happenstance—the passage of time—and vacatur was appropriate); *Nat'l Football League Players Ass'n v. Pro-Football, Inc.*, 79 F.3d 1215, 1216-17 (D.C. Cir. 1996) (observing that vacatur of the district court decision would have been appropriate had the mootness been due to the fortuitous expiration of the 1993-94 football season but reversing previous order vacating judgment of the district court because mootness resulted from party dropping all claims to relief beyond the 1993-94 season). Because mootness occurred due to happenstance, this Court should vacate the D.C. Circuit's August 18, 2006, Order with respect to the Dayton Office and should remand this action to the D.C. Circuit with directions to dismiss this action as moot and to vacate the district court's September 7, 2004, Order denying the Dayton Office's Motion to Dismiss.

Respectfully submitted.

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